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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

FILE No. 492.

JAMES L. HYATT, AS CHIEF OF POLICE OF THE CITY OF ALBANY, *Plaintiff-in-Error*,

against

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF CHARLES E. CORKRAN, *Defendant-in-Error*.

BRIEF OF DEFENDANT-IN-ERROR.

WILLIAM S. BRYAN, JR.,
A. DeR. SAPPINGTON,
Counsel for Defendant-in-Error.

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THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF CHARLES E. CORKRAN, *Defendant-in-Error*.

BRIEF OF DEFENDANT-IN-ERROR.

This Writ of Error is from a judgment of the Court of Appeals of New York, discharging on *Habeas Corpus* the Defendant-in-Error, Charles E. Corkran, from the custody of the Plaintiff-in-Error, as Chief of Police of the city of Albany, by whom the right to detain him in custody was claimed under a warrant issued by the Governor of New York for the extradition of said Corkran, charged with the commission of the crime of larceny and false pretences in the State of Tennessee.

It is respectfully submitted that no Federal question is involved in the case; that the sole issue raised on the Record, and the sole issue determined by the Court of Appeals of New York, was one of fact, *i. e.*, that the Defendant-in-Error was not a fugitive from justice from the State of Tennessee.

STATEMENT OF THE CASE.

On March 13, 1902, Charles E. Corkran, the Defendant in Error, sued out a Writ of *Habeas Corpus* before Mr. Justice D. Cady Herrick, of the Supreme Court of New York, claiming that he was unjustly restrained of his liberty by the Plaintiff-in-Error. (Record, pages 2, 3.)

On March 17, 1902, the Plaintiff-in-Error made his return to the Writ of *Habeas Corpus*, stating that Corkran was in his custody and detained by him "as Chief of Police of the City of Albany, under and by virtue of a Warrant issued by the Governor of the State of New York, for the extradition of said Charles E. Corkran, charged with the commission of the crime of larceny and false pretences *in* the State of Tennessee." (Record, page 4.)

As part of the return was a copy of the Governor's Warrant. This Warrant, dated March 13, 1902, recites: "*It having been represented to me by the Governor of the State of Tennessee* that Charles E. Corkran stands charged in that State with having *committed therein, in the county of Davidson*, the crimes of *larceny* and *false pretences*, which the said Governor certifies to be crimes under the laws of the said State, and that the said Charles E. Corkran has *fled therefrom* and taken refuge in the State of New York." (Record, page 5.) The Warrant further recites that the Governor of Tennessee demands of the Governor of New York "pursuant to the Constitution and laws of the United States," that he cause said Corkran to be arrested and delivered to a named agent duly authorized to receive said Corkran into his custody, "and to convey him *back* to the said State of

Tennessee, which said demand is accompanied by copies of indictment and other documents duly certified by the said Governor of Tennessee, to be authentic and duly authenticated, and charging the said Charles E. Corkran with having committed the said crimes *and fled from* the said State of Tennessee, and taken refuge in the State of New York." (Record, page 5.)

No copies of the indictments referred to in this Warrant were filed with the return of the Plaintiff-in-Error, or offered in evidence later in the case.

On the same 17th day of March, 1902, the Traverse of the Defendant-in-Error to this return was filed. In it he denies under oath "that he committed either the crime of larceny or false pretences *or any other crime* in the State of Tennessee." He further denies that he was *within the State of Tennessee* at the times mentioned in the indictments. He states that he has read the indictments and that they charge him with the commission of the crime of larceny and false pretences on the 20th and 30th days of April, 1901, the 8th day of May, 1901 and the 17th day of June, 1901, and the 24th day of June, 1901. Deponent further says that he was not in the State of Tennessee at any time in the months of March, April, May or June, 1901, or at any time for more than a year prior to the month of March, 1901. Deponent further denies that he *fled from* the State of Tennessee, or that he is a *fugitive from the justice* of the State of Tennessee." (Record, page 6.)

The Traverse then avers that Corkran has heard read the papers accompanying the requisition of the Governor of the State of Tennessee "and that said papers do not contain any evidence or proof that said Charles E. Corkran was in the State of Tennessee at any stated times since the 26th and 27th days of May, 1899, and do not contain any evidence or proof that the said Charles E. Corkran was in the State of Tennessee on any day in any of the months

set forth in said indictments when the said crime or crimes are alleged to have been committed." (Record, page 8.)

It will be seen that the recital in the Governor's Warrant was that it was charged that Corkran had committed the crime of larceny and false pretences *in* Tennessee on certain dates; and that the denial was that he had committed the crimes *at all*, and also that he *had been within the State of Tennessee* at the time of their alleged commission.

As the guilt or innocence of the alleged fugitive is not open to enquiry on extradition proceedings, the traversable allegation was, of course, that Corkran had not been in Tennessee at the time when it was claimed that the crimes had been committed. This *jurisdictional fact* was denied, and this denial so far as the Record discloses (and the Record must be taken, it is submitted, as conclusive on the subject) raised the sole issue in the case.

Neither in the Petition for the Writ of *Habeas Corpus*, nor in the Traverse of the Plaintiff-in-Error to the return, is there set up any denial of the validity or efficiency of the Act of Congress regulating extradition, nor is any construction of that Act called for.

The enquiry is simply, whether the allegation in the requisition that Corkran having committed a crime *in Tennessee*, then departed from that State, is true or false?

It will be shown from the Record that *this question of fact* was decided by the Court of Appeals in favor of the Defendant-in-Error.

ARGUMENT.

The issue presented by the pleadings being whether Corkran was in the State of Tennessee when the alleged crimes were committed, it is clear on authority that whether the decision of the Governor of the Asylum State shall be final on the question as to whether the person sought to be extradited was in fact a fugitive from the justice of the

demanding State, is a question proper to be determined by the Courts of that State.

Cook vs. Hart, 146 U. S. 193.

That in New York such enquiry is open to the Courts of that State on *Habeas Corpus*, appears from the decision below in the case at bar.

Said JUDGE CULLEN (Record, page 24):

"The fact that he is a fugitive from justice is, therefore, a matter of proof. While the Warrant of the Governor is presumptive evidence of the fact, there is no reason on principle why it should be conclusive."

The learned Judge then gives reasons and cites authorities to show that this question is open for investigation by the Courts, and then adds (Record, page 25):

"If, therefore, on the return to the Writ, it was clearly shown that the relator was not a fugitive from justice and there was no evidence from which the contrary view could be entertained, which is the fact in this case, as appears by the stipulation and concession of the parties, there is no reason why greater efficiency should be given to the Warrant of extradition than to the Warrant of any other Magistrate, *by* which a citizen is imprisoned, or deprived of his liberty."

Still further on in his Opinion, the learned Judge (Record, page 26) said:

"In the *Jones* Case it is said: 'The Governor of this State is not clothed with judicial powers and there is no provision of the Constitution or laws of the United States, or of this State which provides that his determination is final and conclusive in the case of the extradition of the citizen. In the absence of such a provision we hold that the decision of Governor only makes a *prima facie* case; that it is competent for the Courts in a proceeding of this character to inquire into the correctness of his decision, and discharge the prisoner.'

"In the *Mohr* Case the learned Court said: 'We are of opinion that the probate Judge did not err in discharging the petitioner, and that it was competent for him to hear oral evidence in order to establish the fact that the petitioner was not a fugitive from justice. Any other conclusion than this would establish a doctrine very dangerous to the liberty of the citizen. It would greatly impair the efficacy of the proceeding of *Habeas Corpus*, which has been characterized as the great writ of liberty, and may be regarded not less than the trial by jury, as one of the chief corner stones in the structures of our judiciary system.'"

JUDGE CULLEN then (Record, pages 26, 27) states as an additional reason why the person sought to be extradited should be permitted to controvert the recitals in the Governor's Warrant: "The further suggestion, however, may be made that no law gives a person sought to be extradited the *right* to a hearing before the Governor, or to submit evidence in his behalf. Whatever in these respects may be accorded by the Governor to the accused is a matter of favor, not of right. Therefore, unless he may review his extradition on *Habeas Corpus*, a citizen on the fiat of an executive officer, without a hearing, may be transported, a prisoner to the utmost confines of the country."

JUDGE O'BRIEN in his concurring opinion was equally explicit. He said: "The Warrant on its face stated that it had been represented to the Governor of this State by the Governor of Tennessee that the relator was charged in that State with the crime of larceny and false pretences, and that he had fled from the State and taken refuge in this State. These statements on the face of the Warrant were to be taken as presumptively true in the first instance, and, if the enquiry rested there, the defendant had made out a *prima facie* case to justify the detention. It is important here to note, and to keep always in view, that when the Defendant presented the executive Warrant without any other document or paper or any proof of the facts therein stated, he raised only

a presumption. The Warrant did not conclusively establish the facts recited. It was so held by this Court *(People ex rel. Lawrence v. Brady, 56 N. Y. 182)*, and the law as laid down in that case has never been modified but has been repeatedly approved. Indeed I do not understand that there is now any difference of opinion as to the legal effect of the Warrant as evidence. It raised a presumption, but nothing more. I am not aware of any case in any Court of controlling authority where it was held to be conclusive and no reason is given why it should be." (Record, page 28.)

The view of the Court of Appeals of New York that the recitals in the Warrant of the Governor are only *prima facie* and are liable to be rebutted by proof on *Habeas Corpus* is the prevailing view.

Ex parte Todd, 47 L. R. A. 566.
Matter of Cook, 49 Fed. Rep. 823.
Ex parte Hart, 63 Fed. Rep. 260-1.
Work vs. Conington, 34 Ohio St. 64.
Matter of Manchester, 5 California, 237.
15 Am. and Eng. Encyclopædia of Law, (2d Ed.) 205.

The Court of Appeals of New York then discusses the question of fact whether Corkran had been present in the State of Tennessee at the time the assumed crimes were committed, and had then withdrawn himself from the Jurisdiction of the Courts of that State. The proof on that subject consisted of the testimony of Corkran taken at the hearing before Judge Herrick. (Record, pages 8 and 9.) In this testimony he states that he was in Tennessee on July 2, 1901, and again on July 16, or 17, 1901, and that before these two occasions he had not been in that State since about May 26, or 27, 1899. On July 2d, he was in Nashville for one day on business. He, on that day, called on and notified the Union Bank and Trust Company (on whose claim the indictments against him were found) of his business in Nashville, and of what had been done there. On

July 16th or 17th, Corkran states that he was not in Nashville at all; he merely spent one day in Chattanooga. Corkran's testimony is not contradicted or impeached in any way.

In addition to this uncontradicted evidence, which is the sole proof in the case, there are two agreements of Counsel, one (Record, page 7) stating: "It is conceded that the relator was not within the State of Tennessee between the first day of May, 1899, and the first day of July, 1901.

"It is also conceded that the relator was in the State of Tennessee on the 2d day of July, 1901."

The Second Agreement was made, apparently from the Record, after the hearing before JUDGE HERRICK, and before the hearing on Appeal in the Appellate Division of the Supreme Court; it stipulates, "that three indictments were attached to the requisition papers sent by the Governor of the State of Tennessee to the Governor of the State of New York for the extradition of Charles E. Corkran; that each of the said indictments was found on the 26th day of February, 1902, and that the alleged crimes were charged in said indictments to have been committed on the 1st day of May, 1901, on the 8th day of May, 1901, and on the 24th day of June, 1901, respectively." (Record, page 7.)

It would seem that these admissions effectually disposed of the case of the State of Tennessee, or the Union Bank and Trust Co. or whoever is the real actor in this attempt to extradite Corkran by showing *conclusively* that Corkran had not been in Tennessee when the assumed crimes were alleged to have been committed, and that he therefore could not have been, as to those crimes, a fugitive from justice. Even if the testimony had shown the facts to be otherwise (as it does not) the Court would have been bound by the admissions of the parties. As was well said by the Court of Appeals of Maryland in *Schaidt v. Blaul*, 66 Md. 146: "And although the parties have made a mistake in referring its (the easement being discussed) origin to the deeds exhibited with the Bill of Complaint, we must give effect to

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their admissions, and we can not make a controversy for them over this matter, when they have stated that they have none with each other."

And the Court of Appeals of New York and also JUDGE HERRICK in the Supreme Court (Record, page 10), found the facts in accordance with the written admissions of counsel and the uncontradicted testimony in the case, and found that Corkran had not been in the State of Tennessee and therefore had not fled from the justice of that State.

JUDGE CULLEN in his opinion said: "It is not claimed that the offences for which the extradition of the relator was sought were committed when he was in the State of Tennessee, but it is contended that though not corporeally present at the time of the commission of the offence, he may nevertheless be properly surrendered as a fugitive from the justice of that State, where it was committed." (Record, page 18.)

Again he stated: "But the question in the present case is not one of *alibi*, for stipulation of the parties admits that the defendant was not personally present in the State of Tennessee at the commission of the alleged offences." (Record, page 27.)

For other Statements of the learned Judge to the same effect in other portions of his Opinion, see Record, pages 22 and 23.

In JUDGE O'BRIEN'S concurring Opinion, he said: "It having been conclusively established that the relator was not in the demanding State on the dates when the crimes are charged to have been committed, it follows that he could not have committed the offences and certainly could not have *fled* from the justice of the demanding State. The authorities are unanimous in holding that a person cannot be a fugitive from the justice of the demanding State who was not in that State when the crime charged is alleged to have been committed." (Record, page 29.)

And again: "The demanding State, its agent and counsel for some reason elected to withhold all proof of the facts and circumstances of the alleged larcenies and to stand upon the bare recitals in the Warrant. The *prima facie* proof that the State gave consisting only of the recitals of the Warrant, that the relator was personally present there at the dates named and committed the crimes, was superseded and removed by the solemn and conclusive admissions in open Court that he was not there at the time and consequently could not have fled from justice." (Record, page 30.)

And still again: "But the question whether the relator committed larceny in the State of Tennessee at any time when he was personally present there is not really in the case at all, since there is not now and never was, any serious claim, that he was in that State when the crimes charged were committed, otherwise than constructively." (Record, page 31.)

It will be seen by inspecting JUDGE HAIGHT'S dissenting opinion that he differed from his colleagues, not on any question of law, but as to the proper inference of fact to be drawn from the testimony of Corkran and from the agreements of counsel. This learned Judge seemed to think that because the date laid in the indictment did not have to be proved as averred, that it could be inferred that the agreement of counsel did not mean what it apparently said, *i. e.*, that Corkran was not present in Tennessee when the assumed crimes were committed, but that it merely meant that while Corkran was not present on the dates laid in the indictments, it could still be *inferred*, (in the absence of all proof,) that the offences were committed on some other days, on which dates it might *be inferred* that Corkran was present.

If the Agreements of Counsel were to have this meaning they would truly be a delusion and a snare. It would require considerable ingenuity to suggest any sane reason

why the relator's counsel should have made an agreement which had this meaning and which was therefore absolutely valueless. Equally untenable, it is respectfully suggested, is the criticism of Corkran's testimony. Says the learned Judge: "In neither the petition, affidavit, or testimony does he swear that he was not in the State when the offences charged were committed, but has refrained from so testifying." (Record, page 34.)

When it is remembered that Corkran had sworn (Record, page 6), that he denies "that he committed either the crime of larceny or false pretences *or any other crime* in the State of Tennessee," it is a little difficult, with deference, be it said, to understand how he could be expected to deny in any other manner than he did, that he was in Tennessee when crimes were committed which he swears were never committed at all. All that he could do after stating that the crimes were never committed was to state that he was absent from the State when the crimes were pretended to have been committed. But the best answer to this contention is given by JUDGE CULLEN (Record, pages 23, 24), when he shows that the learned Counsel for the Plaintiff-in-Error put the same interpretation on the Agreement of Counsel, which the majority of the Court of Appeals of New York placed upon it, and which it is respectfully submitted is the only interpretation which in fairness it could bear.

If the facts were open for review, it is respectfully maintained, that there was obviously no error in the conclusion reached by the Court of Appeals of New York, and that that finding should be affirmed.

But the finding of that Court on the facts is not open for review in this proceeding. Nothing is open for review on this Writ of Error, but such rulings in law as erroneously decide some Federal question against the Plaintiff-in-Error.

It is well settled that on a *Writ of Error*, this Court will confine itself to an examination of such of the *questions*

of law decided by the Court below as are properly reviewable here, and that it can not, and will not, review the findings of that Court on *questions of fact.*

In re Neagle, 135 U. S. 42.
Gardner vs. Bonestell, 180 U. S. 370.
Dower vs. Richards, 151 U. S. 658.
In re Buchanan, 158 U. S. 36.
Hedrick vs. Atchison, Topeka, etc. R. R., 167 U. S. 677.
Turner vs. N. Y., 168 U. S. 95.
West. Union Tel. Co. vs. Call Pub. Co., 181 U. S. 103.

Said MR. JUSTICE WHITE, speaking for this Court in *Egan vs. Hart*, 165 U. S. 189: "We, however, conclude that not only the very nature of a Writ of Error, but also the rulings of this Court from the beginning, make it clear that on error to a State Court in a chancery case, as in a case at law, when the facts are found by the Court below, this Court is concluded by such findings. The adjudications are collected very fully in *Dower vs. Richards*, and in the subsequent cases above referred to."

And in delivering the opinion in *Chicago, Burlington, etc. Rd. vs. Chicago*, 166 U. S. 246, MR. JUSTICE HARLAN said: "To this may be added that Congress has provided that the final judgment of the highest Court of a State in cases of which this Court may take cognizance, shall be re-examined upon *writ of error*, a process of common law origin, *which removes nothing for re-examination but questions of law arising upon the record.*"

Whether the accused is a fugitive from justice is a question of fact.

Roberts vs. Reilly, 116 U. S. 80.

We have just seen that this question of fact was decided by the Court below against the Plaintiff-in-Error, and that that finding is not reviewable by this Court.

It can not be denied that this Court has the power to examine the Opinions in the Court below to ascertain the grounds of that Court's decision.

Kreiger vs. Shelly R. R., 125 U. S. 44.
Dibble vs. Bellingham Co., 163 U. S. 69.

It can not be contended successfully that the decision below was against the validity of the authority and power exercised under the Constitution of the United States and under section 5278 of the Revised Statutes. There was no question or denial of the validity and binding authority of either the Constitutional provision or of the Act of Congress. Corkran was discharged on the distinct independent ground that he was not a fugitive from justice; the Court below acknowledge the binding authority of the Statute. To be sure the demand of the State of Tennessee for the custody of the prisioner was denied. But this Court has said: "The validity of a Statute is not drawn in question every time rights claimed under it are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

Cook County vs. Calumet, etc. Canal, 138 U. S. 653.

In *Balto. & Pot. R. R. vs. Hopkins*, 130 U. S. 224, it was said: "Whenever the power to enact a Statute * * * is fairly open to denial and is denied, the validity of such Statute is drawn in question, *but not otherwise.*"

Before the Plaintiff-in-Error can successfully claim that there has been any denial of any Federal title, right, privilege or immunity, he must have set up and claimed such title, right, privilege or immunity in the State Court and such claim must appear from the Record to have been so made below.

Brooks vs Missouri, 124 U. S. 394.

Stated shortly, the case is this:

(*a*) The legality of Corkran's detention under the Governor's Warrant of extradition was a question into which the State and Federal Courts in New York had concurrent jurisdiction to enquire.

Robb vs. Connelly, 111 U. S. 639.

(*b*) The State Court in the exercise of this rightful jurisdiction decided the question of fact, *i. e.*, that Corkran was not a fugitive from justice, against the Plaintiff-in-Error. This decision, as already stated, did not in any way impugn the Statute nor any right conferred by it.

It is, therefore, respectfully submitted that this Writ of Error should be dismissed for want of jurisdiction.

There was some discussion in the oral opinion of JUDGE HERRICK in the Court of original jurisdiction (Record, page 11), and in the prevailing opinions of the Court of Appeals (Record, pages 21, 22, 23, 29 and 31), and in the dissenting opinion of JUDGE HAIGHT in this latter Court (Record, page 38) of the power of the Governor of New York to surrender as a fugitive from justice a person who was not corporeally present in the demanding State when the assumed crime was committed, but who was "constructively" present.

It is submitted that there is nothing in the Record to raise any such question.

The Plaintiff-in-Error has seen fit not to enlighten the Court as to the facts alleged in the indictments, as he could easily have done by producing and filing copies of them.

All we know is that the crimes charged are larceny and false pretences. So far as the crime of larceny is concerned, it is submitted that it would be impossible for any mystical or metaphysical doctrine of constructive presence to apply to it. A man could not commit larceny without being corporeally present where the crime was committed. A trespass is of the essence of larceny; the thief must "take and carry away" the thing stolen.

False pretences could, in its nature, be committed by one actually present where the goods were obtained, or by one at a distance acting either through confederates or innocent agents.

But there is nothing in the pleadings or exhibits in this case to justify *the conjecture* that it was intended to charge Corkran with having obtained anything by false pretences when physically absent from the State of Tennessee. The recital in the Governor's Warrant (which until contradicted is *prima facie* to be taken as true, *Roberts vs. Reilly*, 116 U. S. 95; Opinion of JUDGE CULLEN, Record, page 26; Opinion of JUDGE O'BRIEN, Record, page 30,) is "that Charles E. Corkran stands charged in that State (Tennessee) with having committed therein, in the county of Davidson, the crimes of larceny and false pretences;" and the Warrant also states that the demand of the Governor of Tennessee was accompanied by copies of indictments and other documents charging "the said Charles E. Corkran with having committed the said crimes and fled from the said State and taken refuge in the State of New York." (Record, page 5.)

If the English language has any meaning, these recitals show that the Tennessee authorities categorically charge Corkran with having been actually and corporeally present in Tennessee, with having committed crimes therein "in the County of Davidson," and with having then fled from Tennessee.

As truly and pointedly said by JUDGE O'BRIEN in his Opinion delivered in this case: "Not a single fact is before us that raises any question as to the constructive presence of the relator in the demanding State on the dates named in the indictment or that would warrant *even the suspicion* that he committed the crimes charged by means of an innocent agent.

"All that is said upon that subject is pure conjecture *without any fact upon which to build up the speculation.* On the Record before us the relator was presumptively person-

ally present in the demanding State at the dates named, and there took and carried away the property claimed to have been stolen, or he did not and could not have committed the offence charged in that State at all." (Record, page 29.)

A crime is charged to have been committed at a certain time and place. The accused shows by conclusive testimony that for a long period before the time charged, and for a shorter period afterwards, he was far distant from the place where the crime is alleged to have been committed. No other time is suggested and no other place; although the amplest opportunity is given to show some other time and place. The accused on the plainest principles of justice is entitled to an acquittal. It will not do to imagine that he may have been guilty at some other time and place. The fact to be tried is whether the accused was guilty; and facts must be proved by evidence. And when the particulars alleged against him have been entirely disproved, if other particulars are urged, they must be substantiated by evidence, and not rest entirely on conjecture.

It seems to have been asserted below that *Roberts vs. Reilly*, 116 U. S. 80, has some bearing on this question. In that case Roberts, an alleged fugitive from justice, filed an affidavit to the effect that he was not in New York on "the day laid in the indictment, as the date of the offence." 116 U. S. 87. But there were counter affidavits by Thurston and others "giving in detail the circumstances of the alleged offence, and averring that the prisoner had fled from the justice of the State of New York." 116 U. S. 84.

The answer to the contention that Corkran *may* have been *constructively* in Tennessee has already been partially stated. It is only necessary to say that having been charged with *an actual* presence, and *an actual* flight from justice, and having overthrown these charges by proof, if a *constructive* presence and a *constructive* flight from justice are to be urged, there ought, at least, to be proof, of some sort, of

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some acts on Corkran's part which would tend to show that he had committed these mystical offences. It ought to be shown that he did something which made him constructively present, and something else which showed that he constructively fled from the State. What facts would have these effects, must largely be left to the imagination.

As was strongly said on this aspect of the case in the Court below (Record, page 33) by JUDGE O'BRIEN: "The relator is claiming the benefit and protection of the laws of this State, which guarantee him his liberty against all unlawful restraint. If he has actually fled from the justice of the demanding State, of course he ought to be surrendered; but it is admitted that he did not, and it is safe to say that no one believes for a moment that he did, except possibly in the same way and in the same sense that Jackson fled from the same State in the case cited (Tennessee vs. Jackson, 36 Fed. Rep. 258). Personal liberty must rest in this State upon a very frail and unsafe basis if this Court can be induced to send the relator to Tennessee upon such a vague and fanciful conjecture as that which is at the foundation of the fiction that he may in fact have committed the crime on the 2d of July, and that the prior dates stated by the prosecuting officer of that State are the result of some error or mistake. When the State of Tennessee, or some one authorized to speak for it, is willing to assure us that the suggestion is based upon fact and not upon fiction, it will be timely then to entertain it, but until then the Courts of this State should treat its solemn admission upon the record according to its fair scope and meaning, which obviously is that the relator was not in the State when the crimes charged were committed. I am in favor of reversing the order."

If, however, we indulge in presumptions and speculations not justified by the Record and assume that the question of the right of the Governor to extradite a person for a crime committed when he was only constructively and not actually present was presented to the Court below, and that such question is now so presented to this Court as to be properly

reviewable, it is submitted that there was no authority in the Governor of New York to order the extradition of Corkran for trial for an offence claimed to have been committed when he was not corporeally present in the State of Tennessee.

The Constitution of the United States (Art. 4, Sect. 2, Sub.-Div. 2,) reads: "A person charged in any State with treason, felony or other crime, *who shall flee from justice*, and be found in another State, shall, on demand of the executive authority of the State *from which he fled*, be delivered up, to be removed to the State having jurisdiction of the crime."

Flight—being a fugitive from justice—is the jurisdictional fact. In speaking of the necessity for an actual flight or *departure* from the demanding State of the accused before he can be said to be a fugitive from justice, JUDGE SEEVERS in delivering the opinion of the Court in *Jones vs. Leonard*, 50 Iowa, 108, said: "It is difficult to see how one can flee who stands still. That there must be *an actual fleeing* we think is clearly recognized by the Constitution of the United States. The words: 'who shall flee' do not include a person who never was in the country from which he is said to have fled."

A great cloud of State decisions enforce the construction of the Constitution that the accused must have been physically present in the demanding State at the time when the assumed crime is alleged to have been committed.

Wilcox vs. Nolze, 34 Ohio St. 520-4.
In re Manchester, 5 California, 237.
Jones vs. Leonard, 50 Iowa, 106.
In re Tod, 12 S. Dakota, 386, 393-4.
In re Mohr, 73 Alabama, 503, 514.
In re Fetter, 23 N. J. L. 311.
In re Voorhees, 32 N. J. L. 150.
Hartman vs. Aveline, 63 Indiana, 345.
Ex parte Knowles, 16 Ky. L. Rep. 263.
In re Greenough, 31 Vermont, 279.

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Kingsbury's Case, 106 Mass., 223, 227.
Re Heyward, 1 Sandf., 701.
State vs. Hall, 115 N. C. 811.
Same case, 28 L. R. A. 289.

In this last case, Hall standing within North Carolina murdered a man in Tennessee, by shooting him across the State line. He was acquitted in North Carolina because under the then existing law of that State no provision was made for maliciously and wilfully firing a shot, which struck and killed a man who was beyond the State's jurisdiction. After Hall's acquittal, an attempt was made to extradite him into Tennessee. This was resisted on the ground that he had not been physically present in the State of Tennessee when the alleged crime was committed, and that he therefore could not be a fugitive from the justice of that State. In adopting this view as sound JUDGE AVERY, speaking for the Supreme Court of North Carolina said: "It is not pretended that a single Appellate Court, Federal or State, or a respectable law writer has given any other interpretation to the law than that adopted by us."

The same interpretation of the Constitutional provision was followed by the Governor of Illinois in the attempt to extradite Mr. Storey, Editor of the *Chicago Tribune* into Wisconsin, (3 Central Law Journal, 636); and by the Governor of Maryland in the case of Max Juhn, attempted to be extradited into New York (2 Moore on Extradition, Sect. 585); and by the Governor of New York in the case of Mitchell, attempted to be extradited into New Jersey (4 New York Crim. Rep. 596).

The law is declared in the leading text books to the same effect.

2 Moore on Extradition, Sect. 581.
Spear on Extradition, pages 397, 499.
7 Am. & Eng. Encyclopædia of Law (1st Ed.) 646 and Note 1.
12 Am. & Eng. Encyclopædia of Law (2nd. Ed.) 603 and Note 3.

And the same rule, that there must have been an actual presence in and departure from the demanding State is adopted in the Federal Courts.

In re Samuel Jackson, 2 Flipp. 183, 186.
Same Case, Fed. Cas. No. 7125.
Ex parte Jos. Smith, 3 McLean, 121.
Same Case, Fed. Cas. No. 12968.
Ex parte McKean, 3 Hughes, 25.
U. S. vs. Fowkes, 49 Fed. Rep. 52, 53.
Tennessee vs. Jackson, 36 Fed. Rep. 258.
Same Case, 1 L. R. A. 370.
In re White, 55 Fed. Rep. 54.
Same Case, 5 C. C. A. 29.
Ex parte Reggel, 114 U. S. 651.
Roberts vs. Reilly, 116 U. S. 97.

Mr. Justice Harlan in delivering the opinion of this Court in *Ex parte Reggel*, 114 U. S. 651, said: "Undoubtedly, the Act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the Appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the Appellant was entitled, under the Act of Congress, to insist upon proof that he was *within the demanding State* at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process."

Mr. Justice Matthews in delivering the Opinion of this Court in *Roberts vs. Reilly*, 116 U. S. 97, said: "To be a fugitive from justice, in the sense of the Act of Congress, regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having *within a State* committed that which by its laws constitutes a crime,

when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction, and is found within the territory of another."

It was also suggested in the Brief for the Plaintiff-in-Error in the Court of Appeals of New York, that the fact that Corkran was in Tennessee on July 2, 1902, and that he, after openly transacting his business there, came home when his business was finished, in some unexplained way, made him a fugitive from justice. The force of this suggestion is not perceived. It is, it is submitted, fully and satisfactorily refuted by JUDGE CULLEN in his Opinion in the Court below (Record, page 22), where he said: "If the relator was not otherwise subject to extradition to the State of Tennessee, because he was not personally present in that State at the commission of the alleged offenses, his subsequent presence in the State for a single day, nearly a year before the institution of any prosecution against him, could give that State no right to require his surrender. The question is whether he is a fugitive from justice, not whether the Courts of the State of Tennessee have jurisdiction of his alleged offenses. That jurisdiction they had at all times, if at all, provided they could secure his person. I am at a loss to imagine how a man's voluntary visit to a State can constitute him a fugitive from the State when he was not such before. I should consider it as having exactly the contrary effect. If there be any force in this occurrence it must be not in his going into the State, but in his failing to remain there. *It is not, however, suggested* that he in any respect offended against the laws of Tennessee *while present there.* He went there for a specific purpose, and his business accomplished, immediately left. It is not pretended that his stay was curtailed or he left the State on account of any suspicion of a prosecution. Would he have been liable to extradition because on a journey to New Orleans, his route passed through the State of Tennessee? Such a result seems to me utterly unreasonable. No distinction can be drawn between the two cases."

What JUDGE O'BRIEN said (Record, pages 32, 33), is also in point: "That must follow from the admission that the relator was not in the demanding State at the times stated in the indictment as the dates when the alleged crimes were committed. On the hearing of this case upon the return of the writ, the State of Tennessee could have shown all the facts and circumstances of the alleged crime for which it had demanded the surrender to it of the person of the relator, as this State did it in the Roberts case (*supra.*) But instead of taking that course, all the facts and circumstances are left clouded in mystery, except so far as they are disclosed by the admissions referred to. When it admitted that the relator was not in the State at the times laid in the indictment, and gave no other light as to the facts, the case for detention failed. The State of Tennessee does not ask for the surrender of the relator on the ground that he committed any crime in that State on the 2d day of July, 1901, nor does it even suggest that its prosecuting officer made any mistake in stating the 24th of June as the true date of the commission of the offense."

English decisions on International extradition where persons have been surrendered who were charged with the crime of obtaining money under false pretences by letters written from beyond the jurisdiction of the demanding country, have no bearing on the question of the right to an interstate extradition in this country under the Constitution and Act of Congress, because the language of the English Extradition Act (33 Victoria, chapter 52), is very different from the language of the Constitution and of the Act of Congress.

The case of *Reg vs. Jacobi et al.*, 46 L. T. N. S. 595, was referred to in the Brief of the Counsel for the Plaintiff-in-Error, filed in the Court below. That was a case where it was charged that the accused by a letter written in the Netherlands to a person in Germany fraudulently procured goods to be shipped to their order from Germany to the Netherlands.

The report states (46 L. T. N. S., page 595), that "in December, 1879, Jacobi and Hiller absconded to England."

The words used in 33 Victoria, chapter 52, section 10, in describing a person liable to be extradicted (46 L. T. N. S. 594), were "fugitive criminal."

These words are judicially defined in *Reg vs. Nillens*, 53 L. J. Mag. Prob. Div. and Adm., page 158. That was the case of a person who, while in England, procured goods to be delivered to his order in Hamburg, by means of a fraudlent letter written from England to another person in Germany.

In delivering his opinion in this case CAVE, J., after stating that the term used to describe the persons to be surrendered is "fugitive criminal" and after calling attention to the definition of "fugitive criminal" furnished in Section 26 of the English Act as meaning "any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign State, who is in or is suspected of being in some part of her Majesty's dominions," adds: "It is clear then that the crime was committed in a foreign State. But against this, it is urged that to come within the definition, he must have fled from that State to some part of her Majesty's dominions, but there is nothing of that in the Section. The words are: 'who is in or is suspected of being in some part of her Majesty's dominions,' and I cannot give these words other than their plain meaning. The object of this definition is clear, for if it were otherwise, it would be possible for a man in England to commit a crime in a foreign country, for which, at least in certain cases, he could not be tried in England, and yet not be liable to be extradicted. The Legislature, therefore, in dealing with cases of the escape of a criminal from another country to this, also included the case of a person in this country committing a crime in another."

53 L. J. Mag. Prob. Div. and Adm., page 158.

Nor are cases in the Courts of this country on International Extradition precedents in point. Whether a person apprehended in this country and sought to be extradited to some foreign country, shall be delivered up depends, of course, upon the terms of the treaty with that country. The provisions of these several treaties are, it is believed, seldom, if ever, in the language of the Constitution providing for interstate extradition. For example, Article X of the Treaty with Great Britain of 1842 in providing for the extradition of criminals, stipulates as follows: "It is agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, officers or authorities respectively made, deliver up to justice all persons who being charged with the crime of murder * * *, committed within the jurisdiction of either, shall seek an asylum *or shall be found within* the territories of the other."

So in the Treaty of 1861 with Mexico, it is provided in Section 1: "It is agreed that the contracting parties shall on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who being accused of the crimes enumerated in article third of the present Treaty, committed within the jurisdiction of the requiring party, shall seek an asylum *or shall be found within the territories* of the other."

It is respectfully submitted that the doctrine that there can be a constructive presence in a State and a constructive flight therefrom has no more foundation in law, than has the theory that there is any charge of a crime committed by Corkran when not physically and actually present in the State of Tennessee, any foundation in the facts of this case, as disclosed by the Record. Both are mere presumptions, without anything to support them.

From the concluding paragraph of the dissenting opinion of JUDGE HAIGHT (Record, page 38), it would seem that that learned Judge thought that *public policy* required that

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there should be some means of arresting persons in one State charged with having by the use of the mail or the telegraph obtained fraudulently money, goods or credits from persons in another State.

In answer to this, it is respectfully suggested that the question is not one *of public policy*, but *of power* under the Constitution and Act of Congress.

This must, of course, be ascertained by turning to the words of the Constitution and of the Act of Congress, and ascertaining what they meant; not what we may now consider they ought to have meant.

In delivering the Opinion of this Court in *U. S. vs. Chase*, 135 U. S. 262, MR. JUSTICE LAMAR observed: "Ashurst J. said in *Jones vs. Smart*, 1 T. R. 51: 'It is safer to adopt what the Legislature have actually said than to suppose what they meant to say.' In the *Queensborough Cases*, 1 Bligh. 497, Lord Redesdale said: 'The proper mode of disposing of difficulties arising from a literal construction is by an Act of Parliament and not by the decision of Court.'"

If, however, the question of supposed public policy were entitled to any weight in discussing a question of the meaning of a clause in the Constitution affecting the liberty and safety of the citizen, it might be urged that the collection of civil debts by a threat of criminal prosecution, is a practice not infrequently indulged by attorneys of the baser sort, and by business men of not very high principle, and that any rule which rendered possible the transportation of persons for trial to a distant portion of the Union, whenever there is a business dispute as to the truth of a warranty or representation made in correspondence, would vastly encourage this species of blackmail. That compounding a felony is a crime, seems to be an obsolete rule of law, in certain enterprising commercial centres.

What was said by JUDGE KEY in delivering his judgment in *Tennessee vs. Jackson*, 36 Fed. Rep. 260 is in point:

"Jackson was not a fugitive. He had not in all his life been in Tennessee; had never fled from it; and his case did not fall within the positive terms of this law. The oath of the detective was false, and the Governors of the two States imposed upon. The whole proceeding was a fraud upon the law. If this arrest and imprisonment are to be maintained, the opportunities for wrong and abuse of this law will be great and widespread. Commercial transactions are largely conducted by mail and telegraph. If the seller at one end of the line, and the buyer at the other, with the aid of detectives in cases of dispute and controversy between them are to be allowed, under such proceedings as these, to have the citizens of one State carried to another State for trial under the false allegation that the person charged has fled, instances of oppression may not be few."

The inquiry in this case is whether Corkran was in the State of Tennessee "at the time he is alleged to have committed the crime charged." *Regell's Case*, 114 U. S. 651. This was the *fact to be proved.* It has been solemnly decided by the State Court of last resort that *the fact has been disproved.* Where is the Federal question before this Court?

This is a most remarkable case. The Warrant no where states that the governor of New York *found as a fact* that Corkran was a fugitive from justice; nor that any *sworn evidence* of that fact was submitted to him; nor that he had any definite or satisfactory evidence on this subject of any sort before him. All that a fair reading of the Warrant (Record, page 5) discloses on the subject of any flight from justice by Corkran is that the governor of Tennessee "represents" him to be a fugitive and that copies of an indictment "and other documents" "charge" him with being such a fugitive. A Governor of a State causes the arrest of a man upon a Warrant, which does not charge that the fact exists which would make him liable to arrest, *i. e.*, that he is a fugitive from justice. In the course of the proceedings this fact is no where even indicated. And the Court com-

petent to decide the question finds that it is disproved. Yet the record is brought to this Court.

For all these reasons it is respectfully submitted that this Writ of Error should be dismissed for want of jurisdiction; and that failing this, the judgment should be affirmed on the merits.

WILLIAM S. BRYAN, JR.,
A. DER. SAPPINGTON,
Counsel for Defendant-in-Error.

POSTSCRIPT.

Since the preparation of the above Brief, the Brief of the Plaintiff-in-Error has been received from the Clerk of this Court.

The attention of the Court is called to the fact that the Brief of the Plaintiff-in-Error contains numerous statements as to the supposed facts which are not justified by nor found in the Record.

If it were true that Corkran had hearings before the Governor of New York, or that at those hearings he (as stated on page 26 of the Brief of the Plaintiff-in-Error) "made several statements with reference to the matter, none of which were taken down, but all of which was material, and have great influence with the Governor in coming to his decision," it is respectfully suggested that if the Plaintiff-in-Error considered that such alleged hearing before the Governor or such alleged statements by Corkran had any possible bearing on the Federal questions, supposed to be presented in this Court, the fact that the hearings were had or the statements were made, should have been proved in

the Court of first instance and should so appear from the Record; and that as this was not done, they can not now with propriety be relied on or stated in this Court.

The statement in the Brief of the Plaintiff-in-Error, page 6, that the indictments presented to the Governor of New York were "supported by the certificate of the attorney general of the State of Tennessee, that the indictments were properly found and *the charge made in good faith*, and it was not found for the purpose of collecting a debt" finds no justification or support in the Record before this Court.

If this Court felt itself at liberty to go beyond the Record, and to consider a question of fact involving in no way any Federal question, it is respectfully suggested that the affidavit of Mr. Johnson sent to the Clerk to be filed in opposition to the Motion to advance this case for hearing, renders it very probable that this whole proceeding is a mere blackmailing scheme, instituted and carried on by the Union Bank and Trust Company of Nashville, Tennessee, for the purpose of collecting a debt, and that if the Attorney General of Tennessee really gave such a certificate, as he is stated to have given, he was imposed upon.

APPENDIX.

STATE OF OHIO, } ss.:
HAMILTON COUNTY. }

Edgar M. Johnson being duly sworn, on oath deposes and says that he is an attorney and counsellor at law, and a member of the firm of Stricker & Johnson, of Cincinnati, Ohio; that the said firm are attorneys for the American Hardwood Company, a bankrupt; that on Saturday, January 11, 1902, deponent was in Chattanooga, Tenn., for the purpose of arguing a motion for the appointment of Receivers in the bankruptcy proceedings filed by the Union Bank and Trust Company of Nashville, Tenn. et al., against the American Hardwood Company; that C. E. Barthell, of Nashville, Tenn., appeared as the attorney for the Union Bank and Trust Company of Nashville.

Deponent says that on the evening of January 11, 1902, he was seated with said Barthell in the office of the Read House, Chattanooga, Tenn., informally discussing the various phases of the American Hardwood Bankruptcy proceedings and what the creditors of said bankrupt might ultimately expect to realize on their claims. Deponent said, in the course of said conversation, that he thought the creditors might get from twenty-five to thirty-five cents on the dollar, whereupon said Barthell volunteered the statement that he expected to collect one hundred cents on the dollar for his client, the Union Bank and Trust Company. Thinking that the remark was made facetiously, deponent then asked said Barthell how he proposed to get it, to which he (Barthell) answered that he hoped to be able to indict Corkran (referring to Charles E. Corkran.) Said Barthell also stated that he thought Corkran had money, and that he would be willing to pay whatever might be necessary should he (Barthell) succeed in having him indicted in Nash-

ville. Whereupon deponent asked said Barthell of what crime Corkran had been guilty, to which said Barthell replied that he (Barthell) was no criminal lawyer, but that he had consulted some of the best criminal lawyers in Tennessee, who had informed him that they thought Corkran had been very cautious, but that "his foot had slipped on one or two occasions."

Further deponent saith not.

EDGAR M. JOHNSON.

Sworn to before me and subscribed in my presence this 27th day of March, 1902.

[L. S.] NATHANIEL WRIGHT,
Notary Public, Hamilton County, Ohio.